Supreme Court, U.S.
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NO. 92-1679

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

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FRANCES X. HOPKINS, Warden
Nebraska State Penitentiary,

Petitioner,

vs.

JOHN E. RUST,

Respondent.

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BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal district court and the Eighth Circuit Court of Appeals erred in holding that Rust fairly presented his due process claim to the state courts?

2. Whether the federal district court and the Eighth Circuit Court of Appeals erred in holding that the decision in Holtan v. Black, 838 F.2d 984 (8th Cir. 1988), was binding precedent?

3. Whether the federal district court and the Eighth Circuit Court of Appeals erred in holding that Rust's constitutional right to due process of law was violated in that: 1) Rust's direct appeal was essentially an unreviewable resentencing; and 2) the discretion of the capital sentencing panel was not sufficiently guided as to the applicable standard of proof?

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Constitution of the United States, Article XIV, Section 1. [N]or shall any State deprive any person of life, liberty, or property, without due process of law ...

28 U.S.C. §636(b)(1) (pertinent text omitted)

28 U.S.C. §2254 (pertinent text omitted as provisions are lengthy).

Neb. Rev. Stat. §29-2521.03 (Cum. Supp. 1978) Criminal homicide cases; appeal; sentence; Supreme Court review. The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524. Source: Laws 1978, LB 711, §3. Effective date July 22, 1978.

Neb. Rev. Stat. §29-2519 et.seq. (Reissue 1975) Special Procedure in Cases of Homicide (pertinent text omitted as provisions are lengthy).

STATEMENT OF THE CASE

Respondent, John Edward Rust (hereinafter 'Rust'), is an inmate at the Nebraska State Penitentiary. He was convicted by a jury in the Douglas County District Court of first degree murder while in the commission of a crime pursuant to Neb. Rev. Stat. §28-401, (Supp. 1973), (felony murder), and three counts of shooting with intent to kill, wound or maim pursuant to Neb. Rev. Stat. §28-410, (Cum. Supp. 1972).

Rust was sentenced to death on the felony murder charge and to 16 2/3 to 50 years imprisonment (concurrent) on the other three charges. Sentencing was had before a three-judge panel. The convictions and sentences were affirmed on direct appeal by the Nebraska Supreme Court in State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977), and this Court denied certiorari in Rust v. Nebraska, 434 U.S. 912 (1977).

Rust's challenge to these convictions pursuant to the Nebraska Post Conviction Act was denied by the Douglas County District Court, and that decision was affirmed by the Nebraska Supreme Court in State v. Rust, 208 Neb. 320, 303 N.W. 2d 490, cert. denied, 454 U.S. 882 (1981).

Following the denial of post conviction relief in the state court, Rust sought a writ of habeas corpus in the United States District Court for the District of Nebraska. In an unreported memorandum opinion, the United States Magistrate recommended dismissal without prejudice to allow exhaustion of available state court remedies. Rust v. Clarke, CV81-L-332 (D.Neb. Oct. 5, 1982).

Rust again sought relief under the Nebraska Post Conviction Act, where denial of his claims by the Douglas County District Court was affirmed on appeal. State v. Rust, 223 Neb. 150, 388 N.W.2d 483, cert. denied, 481 U.S. 1042 (1987).

A petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 was filed in the United States District Court for the District of Nebraska on June 9, 1987, and an Amended Petition was filed July 6, 1988. (J.A. 28).

The case was originally assigned to the Honorable Warren K. Urbom. Pursuant to Magistrate Pieste[illegible]'s order that the parties submit briefs and relevant records, t[illegible] the parties stipulated that the court could receive as evidence the e[illegible] entire record of all proceedings, which included Rust's tr[illegible]ial, both state post convic- tion actions and Rust's initial habea[illegible]s corpus action. (J.A. 29).

On May 26, 1989, Rust's case was [illegible] reassigned to Judge William G. Cambridge and the matter was then [illegible] referred to Magistrate Richard G. Kopf for findings and recommendati[illegible]ons. (J.A. 30, 31).

The Magistrate issued his findi[illegible]gs and recommendations in an opinion filed February 14, 1990. (J.[illegible].A. 26). Generally, the Magistrate found that Rust was denie[illegible]d due process of law at his sentencing hearing in that the senter[illegible]cing panel was not provided with sufficiently clear instructions [illegible]as to the applicable standard of proof (proof beyond a reasonable d[illegible]doubt) regarding the aggravat- ing circumstances. (J.A. 26, 27).

The District Court reviewed the [illegible]findings and recommendations pursuant to 28 U.S.C. §636(b)(1) and [illegible]local Rule 49(B), and found that they should be accepted. (J.A. [illegible]135). On May 13, 1991, Judge

Cambridge entered an order adopting the Magistrate's findings and recommendations and denying Respondent's objections thereto. (J.A. 139). Judgment was entered in favor of Rust and against the Respondent Frances X. Hopkins, Warden (hereinafter the "state"), providing that Rust's sentence shall be reduced to life imprisonment, unless within sixty (60) days after entry of the judgment the state initiated capital resentencing proceedings. (J.A. 140). Consideration of all other substantive issues raised by Rust was stayed until such time as Rust's sentence had been reduced to life imprisonment or until he had been resentenced. (J.A. 140).

The state appealed the district court's order granting Rust habeas corpus relief. On March 26, 1992, the Eighth Circuit Court of Appeals remanded the case, directing the district court to enter judgment on the remaining issues within ninety (90) days. Rust v. Clarke, 960 F.2d 72 (8th Cir. 1992).

On remand, the district court granted Rust relief on five additional issues involving ineffective assistance of counsel at the capital sentencing trial. (J.A. 141). Relief was denied on all other issues. The district court again ordered that Rust be granted a new sentencing hearing or that his sentence be reduced to life imprisonment. (J.A. 140). The state's appeal and Rust's cross-appeal to the Eighth Circuit Court of Appeals followed.

The Eighth Circuit Court of Appeals affirmed the issuance of the writ of habeas corpus, holding that the proceedings in the Nebraska Supreme Court on Rust's direct appeal violated due process and deprived Rust of those constitutional rights created by the

Nebraska capital sentencing procedures. (J.A. 23). As to the district court's finding that Rust was denied effective assistance of counsel during the sentencing phase of his trial, the Court of Appeals held that this issue need not be analyzed given the affirmance of the granting of the writ on the due process issue. (J.A. 23). The district court's denial of relief as to the other issues presented in Rust's cross-appeal was affirmed. (J.A. 25). It is from this decision that the state seeks relief by way of Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

John E. Rust is a prisoner of the State of Nebraska currently under a sentence of death. Rust sought habeas corpus relief in the Federal District Court for the District of Nebraska pursuant to 28 U.S.C. §2254. Such relief was granted in the district court on essentially two issues.

First, the district court found that the state sentencing panel was not provided with sufficiently clear instructions as to the applicable standard of proof. (J.A. 137, 139). The subsequent appellate application of the new standard of proof by the Nebraska Supreme Court failed to provide the requisite due process protections. (J.A. 82-84). Second, the district court found that Rust was denied effective assistance of counsel at the sentencing phase of his capital trial. (J.A. 140). Judgment was entered in favor of Rust providing that his sentence was to be reduced to life imprisonment, unless the state initiated capital resentencing proceedings within sixty (60) days.

The Eighth Circuit Court of Appeals affirmed the judgment of the district court, holding that the proceedings in the Nebraska Supreme Court violated due process and deprived Rust of his constitutional rights created by the Nebraska capital sentencing procedures. (J.A. 23). Given their decision on the first issue, the Court of Appeals did not feel it necessary to reach the ineffective assistance of counsel argument, which would necessarily be cured in the resentencing proceedings. (J.A. 23).

The state argues in its petition that:

1) *The due process issue involving the capital sentencing standard was not fairly presented to the state courts;*

2) *The Eighth Circuit Court of Appeals decision in Nolan v. Black, 838 F.2d 984 (8th Cir. 1988) was not binding precedent; and*

3) *There was no due process violation given the de novo review of the sentencing proceeding by the Nebraska Supreme Court.*

Rust's response to the state's arguments is as follows:

1) The capital sentencing standard of proof in effect in the state of Nebraska at the time Rust was sentenced was that standard enunciated in Grandsinger v. State, 161 Neb. 419, 73 N.W.2d 632 (1955) cert. denied, 352 U.S. 880 (1956). In Rust's direct appeal, the Nebraska Supreme Court announced that Nebraska's new statutory capital sentencing scheme required proof of aggravating

circumstances beyond a reasonable doubt. Rust objected to the application of such standard to him for the first time on appeal by way of Motion for Rehearing and Brief in Support. Such motion was summarily denied. The legal and factual arguments presented to the state court were sufficient to fairly present this due process issue;

2) The Eighth Circuit's holding in Holtan v. Black, 838 F.2d 984 (8th Cir. 1988), was a decision on the merits of this issue and is binding precedent. The direct appeals in Holtan and Rust were decided on the very same day by the Nebraska Supreme Court. In each, the new sentencing standard was applied for the first time. In Holtan v. Black, 838 F.2d 984 (8th Cir. 1988), the state conceded, on this identical issue, that Holtan should be resentenced. To resentence Holtan under the appropriate standard and then execute Rust without such resentencing would certainly raise issues as to arbitrary and capricious application of capital sentencing procedures; and

3) The state argues the Nebraska Supreme Court cured any capital sentencing deficiencies as a result of a de novo review pursuant to Neb. Rev. Stat. §29-2521.03 (1989). However, the effective date of such statute was July 22, 1978. Rust's direct appeal was decided some seventeen (17) months prior

to this date, on February 2, 1977. State v. Rust, 197 Neb. 528, 250 N.W.2d 867, cert. denied, 434 U.S. 912 (1977). Consequently, such de novo review could not have occurred.

Therefore, Rust was denied due process as a result of the failure to adequately channel the discretion of the sentencing panel with respect to the appropriate standard of proof to be applied in capital sentencing proceedings.

Rust was also denied his right to the two-tier sentencing process guaranteed him by the Nebraska Death Penalty Statutes. NEB. REV. STAT. §29-2519 et. seq. (Reissue 1975).

ARGUMENT

I.

FAIR PRESENTATION

The United States District Court for the District of Nebraska and the United States Court of Appeals for the Eighth Circuit have both held that John Rust "fairly presented" the issue of his due process violation to the state courts. Therefore, no state procedural bar exists to prevent consideration of this issue by the federal courts.

The state in its petition alleges that "the manner in which the Court of Appeals has dealt with the issue of state court procedural default in this instance is absolutely contrary to the applicable law, and...departs in philosophy and practice from efforts to bring finality to the criminal laws." (Petition for Writ of Certiorari, p.8). A careful examination of the facts of this case in light of the applicable law reveals that this allegation is without merit.

The state claims that Rust failed to follow state court procedural rules because the issue was not raised at the trial level or in his initial brief on direct appeal. The state does, however, acknowledge that Rust raised the issue in his motion for rehearing and supporting brief filed with the Nebraska Supreme Court following its decision on direct appeal.

In a series of four opinions issued simultaneously on February 2, 1977, the Nebraska Supreme Court addressed for the first time the new capital murder sentencing scheme which had been enacted by

the state legislature in 1973. In State v. Rust, 197 Neb. 528, 250 N.W.2d 867, cert. denied 434 U.S. 912 (1977), the court affirmed Rust's conviction and death sentence. On the same day, the court also decided State v. Simants, 197 Neb. 540, 250 N.W.2d 001, cert. denied 434 U.S. 878 (1977), which held for the first time that in capital sentencing hearings, aggravating circumstances must be proven beyond a reasonable doubt. In so holding, the Supreme Court created a new standard of proof and specifically changed the law which had theretofore been in effect in Nebraska under Grandsinger v. State, 161 Neb. 419, 73 N.W.2d 643 (1955), cert. denied, 352 U.S. 880 (1956).

The Nebraska Supreme Court took the new standard that it announced in Simants, supra, and that same day applied it sua sponte in the Rust case. In response, Rust filed a motion and brief for rehearing in order to present to the Nebraska Supreme Court his federal constitutional challenge to this due process violation.

The purpose of requiring that an issue be "fairly presented" to the state court before it may be considered in federal court is to allow the state court an opportunity to correct any federal constitutional error that may have been committed in the state court. Laws v. Armontrout, 834 F.2d 1401 (8th Cir. 1987), cert. denied, 490 U.S. 1040 (1989). If the state court has reached a federal constitutional question despite the existence of a possible state procedural bar, the federal courts may review the issue provided the state court has not specifically asserted a state procedural bar.

In Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), this Court held in a habeus corpus case that the federal courts may reach a federal question on review if it fairly appears that the state court rested its decision primarily on federal law, and there is no "plain statement" that the decision was based on an independent state procedural bar.

The question, therefore, is whether Rust "fairly presented" the due process violation issue to the Nebraska Supreme Court, thereby giving it the opportunity to correct any federal constitutional error that may have occurred in the state court proceedings.

In Laws v. Armontrout, supra, the court explained that to "fairly present" an issue,

> [A] petitioner need give only the substance of his claim to the state courts. But to do so, the petitioner must include the same facts and legal theories to the state court that he seeks to present to the federal court so that the state court can apply the controlling legal principles to the facts bearing upon his federal constitutional claim...To reiterate, "the petitioner must have informed the state court of both the factual and legal premises of the claim he asserts in federal court."...

Id. at 1412 (citations omitted).

Rust's motion for rehearing alleged that "the interests of justice and due process require that the sentence...be vacated and remanded for resentence in conformity with the opinion of this court that the aggravating circumstances must be found beyond a reasonable doubt." (J.A. 64) He specifically referred to the Nebraska Supreme Court's decision in Simants, supra, which overruled Grandsinger, 73 N.W.2d at 632, and held that "the facts upon which the aggravating circumstances are based [must] be proved

beyond a reasonable doubt". (J.A. 64) Rust's supporting brief stated:

> It is very probable that the trial court found the aggravating circumstances using the rule in Grandsinger which this Court has expressly overruled as not applicable to our present law. Since the trial court or panel is the trier of facts as to the aggravating circumstances, this Court has no way of knowing whether the trial court found these circumstances beyond a reasonable doubt and must vacate and remand for a proper sentencing determination.

(J.A. 64, 65)

The Court of Appeals found herein that "this language from the motion for rehearing and brief before the Nebraska Supreme Court squarely presented the facts on which Rust's argument is based. (J.A. 11)

Rust also fairly presented his legal theory in the motion and brief for rehearing, arguing that in all likelihood, the sentencing panel had applied the then-applicable Grandsinger standard which was later expressly overruled by the Court in Simants. Rust pointed out that the Nebraska Supreme Court had no way of knowing what standard was employed by the sentencing panel as fact finders, and that due process required a remand for resentencing rather than application of the new standard to him by the appellate court.

The Court of Appeals herein agreed with the magistrate judge's observations that "the Nebraska Supreme Court had before it every legal and factual component of the argument," and that "the issues are sufficiently close both legally and factually so that it may confidently be said that the Nebraska Supreme Court was fairly presented with the issue now presented here." (J.A. 12)

The state also argues that because Rust did not raise this constitutional issue in his state court post conviction actions, it was never "fairly presented" to any Nebraska court in accordance with the rules of procedure, and is thus barred from further consideration by the federal courts. (Petition for Writ of Certiorari, p. 12) Neither the district court nor the Court of Appeals specifically addressed this argument, having found that Rust fairly presented his due process claim to the state courts when he raised it by motion for rehearing in his direct appeal. On this issue, the Nebraska Supreme Court has repeatedly held that issues raised in a direct appeal will not be reviewed by the Nebraska courts in a post conviction action. In State v. Rust, 208 Neb. 322, 303 N.W.2d 490, cert. denied 454 U.S. 882 (1981), the Nebraska Supreme Court reiterated the rule that:

> "[A] motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated." State v. Holtan, 205 Neb. 314, 317, 287 N.W.2d 671, 674 (1980).

Id., 303 N.W.2d at 492.

Therefore, the state's claim in this regard is meritless.

Finally, the state's argument that there was "no occasion for the Nebraska court to make a 'plain statement' of their reasons for denying [Rust's] motion for rehearing" is frivolous . (Petition for Writ of Certiorari, p.12). The Court of Appeals found that the Nebraska Supreme Court denied Rust's motion for rehearing "summarily and without comment, with no 'plain statement' that the denial was based on an independent state procedural bar. See

Harris v. Reed, 489 U.S. 255, 261-62 (1989)." (J.A. 13) The Court of Appeals further found it significant that "in referring to Simants, the Nebraska Supreme Court itself raised the standard of proof issue in Rust's case. See Rust, 250 N.W.2d at 876." (J.A. 13)

It is clear from the foregoing that at the first opportunity, Rust properly raised the due process issue. He fairly presented all of the relevant factual and legal components in his motion for rehearing and supporting brief. The Nebraska Supreme Court had a fair opportunity to address and correct the constitutional errors raised therein. No state procedural bar exists to prevent consideration of this issue by the federal courts. The due process violation was properly examined and found to exist by the United States District Court for the District of Nebraska and the United States Court of Appeals for the Eighth Circuit.

II.

AS TO THE "BEYOND A REASONABLE DOUBT" SENTENCING STANDARD ISSUE, HOLTAN v. BLACK WAS CORRECTLY APPLIED AS BINDING PRECEDENT

The state in its petition for writ of certiorari argues that the federal district court and the Eighth Circuit Court of Appeals erred when they applied herein, as binding precedent, the holding in Holtan v. Black, 838 F.2d 984 (8th Cir. 1988). (Petition for Writ of Certiorari, p.13). In order to fully and adequately respond to this argument, a brief history is necessary.

On February 2, 1977, the Nebraska Supreme Court simultaneously entered their opinions in four capital cases. Those cases were, State v. Rust, 197 Neb. 528, 250 N.W.2d 867, cert. denied, 434 U.S. 912 (1977); State v. Holtan, 197 Neb. 544, 250 N.W.2d 876, cert. denied, 434 U.S. 912 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 881, cert. denied, 434 U.S. 878 (1977); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849, (1977) overruled on other grounds. Of these, the Nebraska Supreme Court affirmed the imposition of the death penalty in three; Rust, Holtan and Simants.[1]

In each case, the Nebraska Supreme Court announced, for the first time, that the appropriate standard of proof as to aggravating circumstances in a capital sentencing proceeding was proof

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1. On retrial, Simants was found not guilty by reason of insanity. State v. Simants, 330 N.W.2d 910 (Neb. 1983). Upon resentencing, Holtan received a sentence of life imprisonment. (J.A. 34).

beyond a reasonable doubt. State v. Rust, 250 N.W. 2d at 876.[2]

Counsel for both Holtan and Rust (the same public defender in both cases) moved for a rehearing, arguing that due process required that the cases be remanded for resentencing in light of the Nebraska Supreme Court's adoption of the new capital sentencing standard. Both motions were summarily denied without opinion.

Holtan eventually presented this issue to the federal district court by way of a petition for writ of habeas corpus. The district court concluded, on this issue, that the petitioner's claim was well taken and that the matter should be remanded to the state trial court for resentencing. (J.A. 70-73).

The State of Nebraska conceded on appeal that Holtan was entitled to a state court resentencing. On the identical issue presented herein, the Eighth Circuit Court of Appeals in Holtan v. Black, 834 F.2d 984 (8th Cir. 1988) stated:

> As the State concedes, the sentencing panel's failure to ascertain whether the State had demonstrated aggravating circumstances beyond a reasonable doubt requires this case to be remanded.

Id. at 986.

The state now argues that neither it, the trial court nor the Circuit Court of Appeals are bound by the holding in Holtan. They argue that this is so even though the new standard was announced and applied by the Nebraska Supreme Court in Holtan and

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2. The Nebraska Supreme Court also noted in both Simants and Stewart, supra, that the pertinent rules announced in Rust, Holtan, Stewart and Simants, had been incorporated therein. Simants, 250 N.W.2d at 894; Stewart, 250 N.W.2d at 866; (J.A. 61, 75).

Rust on exactly the same date, and even though they both presented the issue to the state courts in exactly the same way (motion for rehearing). The state now argues in this case that they should be treated differently due to admitted "sloppy work" within the office of the State Attorney General or their intentional appeal tactics in Holtan. (J.A. 31, 32, and 75, n.9). In this regard, the magistrate pointed out, "Why should Rust die and Holtan live because one case suits the long-term litigation tactics of the state and the other does not." (J.A. 75, n.9).

The state suggests that Holtan v. Black has no precedential value because it was what they describe as a "concession-driven, un-decision." (J.A. 15). The implication being that the Eighth Circuit Court of Appeals was either negligently or intentionally misled in Holtan, causing them to enter an ill-advised and mistaken opinion. Such is certainly not the case.

The decision of the Court of Appeals was upon the merits of the case presented. Briefs were written, arguments made and a decision entered. Regardless of the state's motives, they were correct in conceding this issue. As the Court of Appeals stated in affirming the ruling of the district court in this case:

> We think it evident that this was a decision on the merits that is binding on this panel. For us to consider Holtan any other way, would raise issues with respect to arbitrary and capricious procedures which would require, on the one hand, that Holtan be resentenced and on the other that Rust be executed without resentencing under the correct standard.

(J.A. 14).

III.

THE IMPOSITION OF AN ENTIRELY NEW CAPITAL SENTENCING STANDARD OF PROOF VIOLATED RUST'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

In Rust's direct appeal, the Nebraska Supreme Court announced that they had that same day decided that, "the factors upon which the applicability of an aggravating factor depends must be proved beyond a reasonable doubt." State v. Rust, 250 N.W.2d 867, 876 (Neb. 1977). The Nebraska Supreme Court then went on to find that they were satisfied from their review of the record that the existence of the aggravating factors had been proven beyond a reasonable doubt.

The state in its petition for writ of certiorari advances essentially three arguments in support of their position that there was no constitutional violation:

A) Statutorily authorized de novo review by the Nebraska Supreme Court;

B) Applicability of the principles announced in Clemons v. Mississippi, 494 U.S. 738 (1990); and

C) Harmless error analysis.

A.

DE NOVO REVIEW

In its petition for writ of certiorari, the state claims that, "Nebraska statutes also mandate that the Nebraska Supreme Court conduct a de novo review of the sentencing record to deter-

mine if the sentence imposed was appropriate. Neb. Rev. Stat. §29-2521.03 (1989)." (Petition for Writ of Certiorari at 17). In addition, the state argues that the Court of Appeals ignored, "the clearly declared state statutory obligation of the Nebraska Supreme Court to review de novo every sentence of death imposed in that state." (Petition for Writ of Certiorari at 27).

What the state fails to recognize is that §29-2521.03 did not become effective in the State of Nebraska until July 22, 1978. Such statute specifically provided that:

> 29-2521.03. Criminal homicide cases; appeal; sentence; Supreme Court review. The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.
>
> Source: Laws 1978, L.B. 711, §3.
> Effective date July 22, 1978.

Neb. Rev. Stat. §29-2521.03 (Cum. Supp. 1978).

The opinion of the Nebraska Supreme Court in Rust's direct appeal was entered on February 2, 1977. Therefore, the effective date of the statute, which the state says was utilized by the Nebraska Supreme Court in reviewing Rust's appeal, was some seventeen (17) months after the opinion had already been entered. How then did the federal district court and the Court of Appeals ignore the Nebraska Supreme Court's statutorily imposed duty of de novo review that

did not, in fact, exist at the time Rust's sentence was reviewed on direct appeal?

Rust has consistently attempted to gain the benefits of the comparative review made available under this particular state statute. However, in Rust's post-conviction appeal, the Nebraska Supreme Court stated quite plainly:

> Defendant's third assignment of error is likewise without merit. "L.B. 711, Laws 1978, was not enacted until after the sentence in this case had been imposed and became final. Having become a final judgment prior to the effective date of L.B. 711, it is not affected by the adoption of L.B. 711. No capital case in which a final sentence was imposed prior to the effective date of L.B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act." State v. Holtan, supra, at 316, 287 N.W.2d at 673. The amendment of a statute under which an accused was convicted does not affect the legitimacy of his conviction or the propriety of his sentence. United States v. Rojas-Colombo, 462 F.2d 1091 (5th Cir. 1972), cert. denied, 410 U.S. 990, 93 S.Ct. 1507, 36 L.Ed.2d 188.

State v. Rust, 303 N.W.2d 490, 493 (Neb. 1981).

It is ironic that the statute which Rust long sought to have applied, but whose protection was denied him, is now relied upon by the State as they mistakenly declare that Respondent has had the full benefit of the de novo review provided thereunder.

In summary then, the opinion of the Nebraska Supreme Court in Rust's direct appeal was announced on February 2, 1977. State v. Rust, 197 Neb. 528, 250 N.W.2d 867, cert. denied 434 U.S. 912 (1977). L.B. 711, §3, which was codified as Neb. Rev. Stat.

§29-2521.03, had an effective date of July 22, 1978. Neb. Rev. Stat. §29-2521.03 (Cum. Supp. 1978). Respondent unsuccessfully sought retroactive application of L.B. 711, §3, in State v. Rust, 208 Neb. 320, 303 N.W.2d 490, cert. denied, 454 U.S. 882 (1981) (appeal of state-post conviction motion). Quite clearly, Rust did not receive the de novo review which the state seeks to convince this Court occurred.

B.

CLEMONS ANALYSIS

In its petition for writ of certiorari, the state suggests that, "support for the actions of the Nebraska Supreme Court's handling of Rust's direct appeal can be found in this Court's ruling in Clemons v. Mississippi, 494 U.S. 738 (1990)." (Petition for Writ of Certiorari at pg. 22-23). As the Eighth Circuit Court of Appeals pointed out, Clemons has no applicability herein.(J.A. 19)

1.

First, it was specifically noted in Clemons that there was no state created entitlement involved. Clemons, 494 U.S. at 747, 110 S.Ct. at 1447. Rust, however, had a state-created liberty interest; the right to be sentenced by the sentencing panel under the appropriate standard of proof. As this Court cautioned in Clemons:

> Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause, Gardner v. Florida, 430 U.S. 249, 358, 97 S.Ct. 1197, 1205, 51

> L.Ed.2d 393 (1977), and we have recognized that when state law creates for a defendant a liberty interest in having a jury make particular findings, speculative appellate findings will not suffice to protect that entitlement for due process purposes. Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980).

Id., S.Ct. at 1447.

In Hicks, supra, this Court held that under state law, Hicks had a liberty interest in having the jury impose punishment, an interest that could not be overcome by the "frail conjecture" that the jury "might" have imposed the same sentence in the absence of an invalid recidivist statute. Hicks, 100 S.Ct. at 2229.

Unlike the situation in Hicks, the Mississippi Supreme Court in Clemons had asserted its authority under an established state law procedure whereby it would be constitutionally able to decide whether the death sentence should be affirmed when one of the two aggravating circumstances upon which the jury had relied was improperly considered. In Clemons, this Court found only that there was "no basis for disputing this interpretation of state law, which was considered by the court below to be distinct from its asserted authority to affirm the sentence on the ground of harmless error... ." Id. at 1447. Additionally, this Court made clear the narrow scope of the holding in Clemons:

> Nothing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing or harmless error analysis when errors have occurred in a capital sentencing proceeding. Our holding is only that such procedures are constitutionally permissible. In some situations, a state appellate court may conclude that peculiarities in a case make appellate reweighing or harmless error analysis extremely speculative or impossible. We have previously noted that appellate

> courts may face certain difficulties in determining sentencing questions in the first instance. See Caldwell v. Mississippi, 472 U.S. 320, 330-331, 105 S.Ct. 2633, 2640-2641, 86 L.Ed.2d 231 (1985).

Id., 110 S.Ct. at 1451.

In Caldwell v. Mississippi, supra, the Petitioner was convicted of capital murder and sentenced to death in a bifurcated proceeding. In their closing arguments at the sentencing stage, Petitioner's attorneys asked for mercy and emphasized to the jury the gravity and responsibility of calling for another's death. In response, the prosecutor urged the jury not to view itself as finally determining whether the Petitioner would die, because a death sentence would be reviewed for correctness by the Mississippi Supreme Court.

This Court held that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the Defendant's death rests elsewhere.

This Court noted that in the capital sentencing context, there are specific reasons to fear substantial unreliability when there are state induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court. The Court focused on the "institutional limits of what an appellate court can do":

> The "delegation" of sentencing responsibility that the prosecutor here encouraged would thus not simply post-pone the defendant's right to a fair determination of the appropriateness of his death; rather it would deprive him of that right, for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangible a jury might consider

in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed, "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson, supra, at 304, 96 S.Ct., at 2991. When we held that a defendant has a constitutional right to the consideration of such factors, Eddings, supra; Lockett, supra, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses. As the dissenters below noted:

> "The [mercy] plea is made directly to the jury as only they may impose the death sentence. Under our standards of appellate review mercy is irrelevant. There is no appellate mercy. Therefore, the fact that review is mandated is irrelevant to the thought processes required to find that an accused should be denied mercy and sentenced to die."

Id., 105 S.Ct. at 2640-2641.

Because this Court could not say that this issue had no effect on the sentencing decision, it determined that the decision was not sufficiently reliable and therefore vacated the death sentence.

2.

Secondly, Clemons authorized the reweighing of otherwise valid aggravating and mitigating factors. Clemons did not authorize the wholesale replacement of defective proceedings with new proceedings in the appellate court. Essentially, what would result in such a situation would be a totally new, unreviewable sentencing proceeding on appeal. Given the sentencing panel's failure to apply the proper standard of proof, there remained in Rust no untainted aggravating factors to reweigh. The process itself was deficient, not simply the evidence or proof as to one aggravating factor.

Finally, there exists an independent constitutional violation in Rust, not present in Clemons. The Nebraska Supreme Court stepped into the shoes of the sentencing panel and resentenced Rust using the new standard of proof. By so doing, they effectively eliminated the possibility of appellate review. The two-tiered sentencing process dictated by the Nebraska Death Penalty statutes, Neb. Rev. Stat. §29-2519 et. seq. (Reissue 1975), had necessarily been eliminated.

Nebraska's death penalty statutes mandate that any sentence of death imposed by the sentencing judge or judges be reviewed by the Nebraska Supreme Court. Neb. Rev. Stat. §29-2524 (Supp. 1974).

The two-tiered process, whereby a sentencer is given specific directions at the penalty trial regarding the proof of aggravating circumstances and an appellate court reviews the exercise of the sentencer's discretion and reweighs the evidence, is very important to the constitutionality of death penalty legislation. Proffitt v. Florida, 428 U.S. 242, 252-53 (1976).

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) this Court held that, if a State wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty, and thus it must define the crimes for which death may be imposed in a way that obviates standardless sentencing discretion. Id. at 1764.

Justice White focused in his dissenting opinion in Godfrey on the importance of this two-tiered process:

> In Gregg v. Georgia, 428 U.S. 153 (1976), we upheld the constitutionality of the capital-sentencing procedures in accordance with which the State of Georgia had sentenced petitioner to death. Two aspects of that scheme impressed us in particular as curing the constitutional defects in the system that was invalidated several years earlier in Furman v. Georgia, 408 U.S. 238 (1972). First, the sentencing system specifies statutory aggravating circumstances, one of which has to be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed. Ga. Code §§ 26-3102, 27-2534.1 (1978). Second, the scheme provides for automatic appeal of all death sentences to the Georgia Supreme Court, which is required by statute to undertake a specific inquiry with respect to the soundness of the decision to impose the death penalty. §27-2537.

Godfrey, 446 U.S. at 445-46 (White, J., dissenting, joined by Rehnquist, J.) (footnote omitted.)

The problem here is that the discretion of the district court sentencing panel was not properly guided and they failed to find the existence of aggravating circumstances beyond a reasonable doubt in deciding to impose the death penalty upon John Rust. The subsequent appellate application of a newly announced standard of proof failed to provide the requisite due process protection demanded by the constitution.

C.

HARMLESS ERROR ANALYSIS

In its petition, the state declares that the Nebraska Supreme Court did not resolve Rust's appeal by means of harmless error analysis. (Petition for Writ of Certiorari, p. 24). However, the state seems to suggest that since the state court could have used harmless error analysis had they wished, this Court should resolve the issue on that basis.

Harmless error analysis has no application to the facts before the Court. This Court in Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441 (1990), did not exclude the possibility of state appellate courts applying harmless error analysis in reviewing capital sentencing proceedings. However, this Court has indicated that such an analysis may require "a detailed explanation based on the record... ." Clemons, 110 S.Ct. at 1451. If the Nebraska Supreme Court did in fact engage in harmless error analysis (which the state disputes), they did not offer a detailed explanation of such analysis. Their reasoning in this regard was limited to their conclusion as to the sufficiency of the proof of aggravating circumstances and an accompanying cite to Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967):

> We are satisfied from our review of the evidence in this case that the facts upon which the findings of the existence of each aggravating factor depends was proved beyond a reasonable doubt and so find. In making such a finding we have applied the same standard of reasonable doubt as applicable to the burden of proof in criminal cases. NJI No. 14.08. See, State v. Rice, 188 Neb. 728, 751, 199 N.W.2d 480; Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.E.2d 705, 24 A.L.R.3d 1065.

State v. Rust, 250 N.W.2d at 876.

Surely, the above language of the Nebraska Supreme Court as to the application of harmless error analysis is similar in form and substance to the brief statement of the Mississippi Supreme Court in Clemons where they said:

> We likewise are of the opinion beyond a reasonable doubt that the jury's verdict would have been the same with or without the especially heinous, atrocious or cruel aggravating circumstance.

535 So.2d at 1364. In response to which, this Court stated:

> Although the court applied the proper "beyond a reasonable doubt" standard, See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 LEd.2d 705 (1967), its cryptic holding suggests that it was beyond reasonable doubt that the sentence would have been the same even if there had been no "especially heinous" instruction at all and only the aggravating circumstance that the murder was committed in the course of a robbery for pecuniary gain was to be balanced against the mitigating circumstances. We agree that it would be permissible to approach the harmless error question in this fashion but if this is the course the court took, its ultimate conclusion is very difficult to accept. As Clemons points out the State repeatedly emphasized and argued the "especially heinous" factor during the sentencing hearing. The State placed little emphasis on the "robbery or pecuniary gain" factor. Under these circumstances, it would require a detailed explanation based on the record for us possibly to agree that the error in giving the invalid "especially heinous" instruction was harmless.

Clemons, 110 S.Ct. at 1451.

Given the failure of the state sentencing panel to apply the proper standard of proof, it would be impossible for the Nebraska Supreme Court to apply harmless error analysis. They would be required in such a situation to simply speculate as to what the sentencing panel would have decided had they applied the correct standard. Even if harmless error analysis were permissible under these circumstances, the "cryptic" holding of the Nebraska Supreme Court does not furnish the requisite detailed explanation on the record such as to support such a finding.

CONCLUSION

The facts and legal issues presented in the petition filed herein are unique to the Respondent, John E. Rust. There are no similarly situated inmates remaining on death row in Nebraska.

Rust was sentenced to death in 1975, soon after the passage of Nebraska's post-Furman capital sentencing scheme. At that time, the beyond a reasonable doubt standard of proof was not applicable to capital sentencing procedures in Nebraska. Grandsinger v. State, 161 Neb. 419, 73 N.W.2d 632 (1955), cert. denied, 352 U.S. 880 (1956). In Rust's direct appeal decided on February 2, 1977, the Nebraska Supreme Court first announced the applicability of the beyond a reasonable doubt standard to capital sentencing proceedings (as to proof of aggravating circumstances). At that time, the statute cited by the Petitioner as providing for de novo review (Neb. Rev. Stat. §29-2521.03 (Cum. Supp. 1978)), was not in effect. It was, therefore, impossible for the Nebraska Supreme Court to accomplish a de novo review of the capital sentencing hearing pursuant to a state statute that would not exist for another seventeen (17) months.

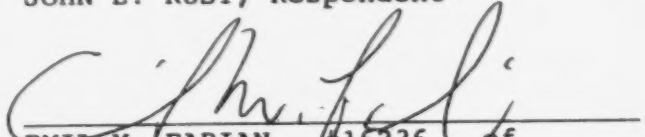
After having the new sentencing standard incorrectly applied to him for the first time in his direct appeal, Rust immediately sought to challenge such finding by way of a Motion for Rehearing. Rust included therein every legal and factual argument necessary to fairly present the issue. His motion was summarily denied with no "plain statement" that the denial was based on an independent state procedural bar.

The State of Nebraska has previously conceded the need for resentencing in a case presenting the identical issue presented here. Holtan v. Black, 838 F.2d 984 (8th Cir. 1988). The defendant in that case was resentenced to life imprisonment. (J.A. 33,34). And yet the state argues that such decision should not be

viewed as binding precedent. It does not strike them as arbitrary and capricious that one man should die and another live simply because "one case suits the long-term litigation tactics of the State and the other does not." (J.A. 75, note 9).

The manner in which the issues were addressed below and the results obtained therein do not present any of the special or important considerations as outlined in Supreme Court Rule 10.1 such as to necessitate granting the petition for writ of certiorari. For that reason and those others previously detailed herein, Rust requests that this Court deny the petition for writ of certiorari.

JOHN E. RUST, Respondent

By: 

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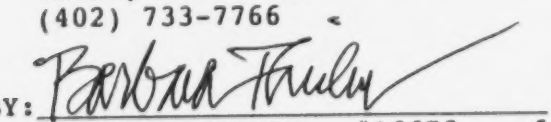
BY: 

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was mailed by regular United States mail, postage prepaid to J. Kirk Brown, Assistant Attorney General, Chief, Criminal Appellate Section, P.O. Box 98920, Lincoln, NE 68509-8920, on this 14th day of May, 1993.

EMIL M. FABIAN